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NO. 123.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

FEDERAL POWER COMMISSION,
Petitioner,

v.

UNION ELECTRIC COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

## BRIEF

**For Respondent Union Electric Company in Opposition.**

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## BRIEF

**For Respondent Union Electric Company in Opposition.**

### QUESTION PRESENTED.

We are not in complete agreement with the statement, at page 2 of the Petition for Certiorari, of the Question Presented. In view of the provisions of the governing statute, the question presented, as we see it, is this:

Whether the proposed construction—in and adjacent to a non-navigable tributary of a navigable stream—of a dam and other structures of a hydroelectric project will affect "the interests of interstate or foreign commerce", within the meaning of § 23 (b) of the Federal Power Act (Part I), solely because the project will be connected by a transmission line with a system serving parts of several states, and some of the project energy will be transmitted in interstate commerce.

## STATUTES INVOLVED.

Parts of Section 3 of the Federal Power Act (41 Stat. 1063, 49 Stat. 838; 16 U. S. C. 796) are set out in an Appendix to this brief. Those parts of Section 3, defining "navigable waters", "project" and "project works", are pertinent here, in addition to Section 23 (b), Part I, of the Act and Section 201 (b), Part II, of the Act, which are set out in Appendix A to the Petition for Certiorari.

## STATEMENT.

For clarification of certain of the factors bearing upon points to be made in this brief, we add the following to petitioner's Statement of the case.

**The Project.** As defined in Section 3 (11) of the Federal Power Act (41 Stat. 1063, 49 Stat. 838; 16 U. S. C. 796), the term "*project*" means a complete unit, including the power house, water conduits, dams, appurtenant works and structures, as well as the primary line or lines for transmission of power therefrom to a point of junction with a distribution or transmission system. The term "*project works*" means the physical structures of a project [Section 3 (12) of the Act].

In this case the project works include the upper and lower pools (the latter formed by a dam in and across the East Fork of the Black River), a pressure tunnel and conduit about 6400 feet in length, connecting the upper pool with a pumping and generating station on an open channel running to the lower pool, two reversible pump-turbine units housed in the generating station, and a 2-circuit transmission line from the generating station to a substation at Rivermines, Missouri, about thirty miles away, which is a point of junction with Union Electric Company's primary transmission system (R. 17-19, 21). Of the structures and equipment constituting the project works only the dam will be constructed in the stream (R. 17); and no generating equipment will be placed in the dam (R. 19).

**The Statute.** Section 23 (b) is in Part I of the Federal Power Act, which consists of sections numbered 1 through 29 (16 U. S. C. 791a-823). That Part constitutes what was the Federal Water Power Act of 1920 (41 Stat. 1063) as amended (49 Stat. 838; 16 U. S. C. 791a-823). The title of the Act was:

"An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of public lands in relation thereto and to repeal Section 18 of the Rivers and Harbors Appropriation Act approved August 18, 1917, and for other purposes" (41 Stat. 1063).

The Federal Water Power Act stood alone until August 26, 1935, when it was made Part I of the Federal Power Act (49 Stat. 838; 16 U. S. C. 791a et seq.). At the same time new sections were enacted in two groups designated as Part II and Part III of the Act. In Part II, consisting of Sections 201 through 209 (49 Stat. 847-853; 16 U. S. C. 824-824h), the Federal Power Commission was given jurisdiction over the transmission of electric energy in interstate commerce and over the sale at wholesale of electricity so transmitted, as well as jurisdiction over facilities for such transmission or sale—with the proviso that the Commission should not have jurisdiction, except as specifically provided in Part II and Part III of the Act, "over facilities used in the generating of electric energy" [Section 201 (b) of Part II of the Act, 49 Stat. 847; 16 U. S. C. 824 (b)].

Part III of the Act (49 Stat. 854-863; 16 U. S. C. 825-825r) consists, in the main, of provisions regarding procedure and other matters related to administration of Parts I and II.

**Section 23 (b) of the Act.** The part of that section which is determinative of the question presented is as follows:

"* * * Any person, association, corporation, State, or municipality intending *to construct a dam or other project works across, along, over, or in any stream* or part thereof, other than those defined herein as navigable waters, and *over which Congress*

*has jurisdiction under its authority to regulate commerce* with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that *the interests of interstate or foreign commerce would be affected by such proposed construction*, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act." (*Emphasis added.*) (41 Stat. 1075, 49 Stat. 846; 16 U. S. C. 817.)

**The Decision Below.** The Court of Appeals, denying the contention of the Commission, held that the intended transmission in interstate commerce of electric energy to be generated at the project did not constitute a proper basis for a finding that the proposed construction would affect the interests of interstate or foreign commerce—within the meaning of the statute (*Union Electric Co. v. Federal Power Commission*, 326 F. 2d 535, at pp. 548-553 [10-12]). Referring to the construction of projects subject to the requirements of Section 23 (b) the Court said:

"* * * the question of the effect of a construction project on interstate commerce must be viewed in its relation to navigable waters. The Commission's jurisdiction thereof must logically rest upon its delegated congressional jurisdiction over the interests of commerce on navigable waters" (326 F. 2d at p. 551).

## ARGUMENT.

The decision of the Court of Appeals is not in conflict with any decision of this Court or with any decision of another court of appeals. We submit that it is a correct decision and that the question raised by the Commission's contrary contention is not of such importance as to justify review by this Court.

**1. The Meaning of Section 23 (b).** Of prime importance here is the familiar rule that a statutory provision must be read in the light afforded by its context. The questioned provisions of § 23 (b) must be interpreted consistently with the purpose and intent disclosed by the statute as a whole. *Rector, etc., of Holy Trinity Church v. U. S.*, 143 U. S. 457, 459; *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U. S. 270, 285. It is clear that that statute—enacted in 1920 as the Federal Water Power Act and now, as amended, constituting Part I of the Federal Power Act—represents an exercise by the Congress of its power with respect to navigable waters and the tributaries of such waters. And that power, though exercisable in a variety of ways and by measures of various kinds, has as its ultimate objective the protection, promotion and regulation of interstate and foreign commerce upon navigable waters. *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U. S. 508, 522-523.

The whole statute, including its title as originally enacted (quoted in the Statement of this brief), shows that the "interests" of interstate and foreign commerce which the statute is designed to protect are the interests of such commerce upon navigable waters of the United States, to which the legislation relates. And that is confirmed by the provisions of § 23 (b).

Those provisions relate to "construction" of physical structures "across, along, over, or in any stream" over

which Congress "has jurisdiction under its authority to regulate commerce." And the question which the statute requires to be answered is whether or not the "interests" of interstate or foreign commerce will be affected by such "proposed construction".

We do not suggest that the effect of the "proposed construction" of the structures comprising the "project works" is to be appraised without regard to the operation for which the structures are designed. But we do suggest that the destination of the products of the operation is irrelevant in appraising the effect of the "proposed construction". The effect of operation of the facilities to be constructed will be exactly the same whether the energy generated is transmitted only within the State of Missouri or is transmitted to other states in interstate commerce. The effect upon the waters involved will not depend in any degree upon the destination of the electricity to be transmitted.

Interstate transmission of electric energy—from hydro plants as well as from steam plants—is dealt with separately in Part II of the Act. As previously noted, that Part gives the Commission jurisdiction over the interstate transmission and sale of electric energy and over facilities used for those purposes—with the proviso, however, that the Commission shall not have jurisdiction, except as specifically provided in Part II and Part III of the Act, "over facilities used in the generating of electric energy" [Section 201 (b) of Part II, 49 Stat. 847; 16 U. S. C. 824 (b)]. The basis and purposes of Part II of the Act are quite distinct and different from those of Part I. As pointed out by this Court in *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17, at p. 22,

> "Part I and Part II provide different regulatory schemes. Part II is an exercise of the commerce power over public utilities engaged in the interstate

transmission and sale of electric energy. See S. Rep. No. 621, 74th Cong., 1st Sess., p. 17. Part II does not undertake to regulate public lands or the use of navigable streams. That function is covered by Part I, which dates back to the Federal Water Power Act of 1920, 41 Stat. 1063."

344 U. S. at p. 22.

In the recently decided case of *Federal Power Commission v. Southern California Edison Co.*, 376 U. S. 205, 218-219, the Court referred to Section 20 of the Federal Water Power Act (now Section 20 of Part I of the Federal Power Act, 41 Stat. 1073; 16 U. S. C. 813), giving the Commission power to regulate rates in certain circumstances. And the Court described as follows the power thus given to the Commission:

"Under the Water Power Act the principal function of the FPC, then composed of the Secretaries of War, Interior, and Agriculture, was the licensing, construction and operation of hydroelectric development projects. Its power to regulate rates was based upon the national power over navigable waters and public lands, and not upon power over interstate commerce. It was exercised only as an incident of the licensing power * * *."

376 U. S. at p. 218.

**2. Petitioner's Interpretation of Section 23 (b).** The theory stated in paragraph 1 (a), pages 6-8 of the Petition for Certiorari, is that in § 23 (b) Congress exercised "the full measure of its jurisdiction under the Commerce Clause." The cases cited in support of that theory are cases involving the National Labor Relations Act (Pet'n 6-7)—all of them demonstrating that local operations (production of steel, manufacture of goods, generation of electric energy, etc.), though intrastate of themselves,

are subject to Federal regulation as "affecting" interstate commerce. But none of those cases reaches the question presented here. For the statute there involved —The National Labor Relations Act (49 Stat. 449; 29 U. S. C. 151 et seq.)—constituted an exercise of the power of Congress over interstate commerce generally. The breadth of the Congressional exercise of power in the Labor Act and the distinction in that respect between those cases and a case of this sort are indicated in the first of the decisions upon which petitioner relies: *Polish Alliance v. National Labor Relations Board*, 322 U. S. 643, 647. In that case the Court, referring to the National Labor Relations Act, said:

> "By that Act, Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate."
>
> 322 U. S. at p. 647.

Distinguishing the Labor Relations Act in that respect from many other statutes, the Court observed:

> "With negligible exceptions, Congress did not exercise its power to regulate commerce prior to its enactment in 1887 of the Interstate Commerce Act. * * * Since that time it has frequently chosen, as the Statutes at Large abundantly prove, to regulate only part of what it constitutionally can regulate."
>
> 322 U. S. at p. 647.

The statute with which we are here concerned (Part I of the Federal Power Act) represents, we repeat, an exercise of the Congressional power *over waters* within its jurisdiction under the commerce power, not an exercise of power over interstate commerce generally.

The Federal Power Act as a whole provides clear proof of this point. For when, in 1935, Parts II and III

were enacted and Part I was amended, the Congress exercised, in Parts II and III, its jurisdiction over the interstate transmission of electric energy. Significantly, however, it did *not* make such interstate transmission a basis for licensing jurisdiction under Part I of the Act.

**3. History of the Legislation.** The Petition refers, at page 7, to the House and Senate reports on the 1935 amendments—with brief quotations therefrom to show that the legislative objective was to enable the Commission to maintain control over all projects with which the Federal Government had "any valid concern." The reports did use that language, but the context in which the language was used is important. The Senate report, referring to § 23 (b) of the Act, says:

> "Under this subsection with the two amendments here made every person intending to construct a project which might conceivably *affect any navigable waters* would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern." (*Emphasis ours.*)
>
> Report of Senate Committee on Interstate Commerce, to accompany S. 2796, S. Rep. 621, 74th Cong., 1st Sess., p. 47 (May 13, 1935).

The House report, referring to amendments of § 23 (b), says:

> "In this way every person intending to construct a project *which might affect navigation* would be required to come to the Commission for a determination of the interests of the United States. This would greatly strengthen the act by enabling the Commission to maintain control over all projects with which the

Federal Government has any valid concern." (*Emphasis ours.*)

> Report of House Committee on Interstate and Foreign Commerce, to accompany S. 2796, H. Rep. 1318, 74th Cong., 1st Sess., p. 26 (June 24, 1935).

Thus the committee reports in both houses of Congress indicate that "*the projects with which the Federal Government has any valid concern*" are those which might affect navigable waters or navigation thereon.

At pages 8-12 of the Petition counsel for petitioner enumerate some of the objectives of the conservationists who were active advocates of legislation for the improvement and utilization of the water resources of the nation. All of that, we submit, is wide of the mark. The constitutional objectives of the legislation were those within the power of Congress over navigable waters and the tributaries thereof—the power which, however exercised, must ultimately be directed to the protection or promotion or regulation of commerce on navigable waters. *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U. S. 508, 523. Of course, where legislation is within the power of Congress for one purpose, other purposes may be subserved. As this Court said in the case to which we have just referred:

> "It is sufficient * * * that Congress has exercised its commerce power, though other purposes will also be served."
>
> 313 U. S. 508, at p. 528.

The Petition for Certiorari refers (at page 9) to the provisions of Section 10 (a) of the Act. Those provisions relate to the conditions upon which licenses shall be issued. They are not operative until and unless it has been deter-

mined that a license should be issued. So they have nothing to do with the question of whether or not a license is required under § 23 (b).

**4. Prior Administrative Interpretation.** In the opinion of the Court of Appeals it is pointed out that the contention of the Commission in this case is contrary to its own administrative construction of § 23 (b), followed for many years prior to its decision in this case (326 F. 2d 535, at p. 552). That factor and the result of it, as discussed in the opinion, are important for the reasons there pointed out. And they add confirmation to the effect of the other considerations which demonstrate that the contention now made by the Commission is not of such importance as to warrant review by this Court.

## CONCLUSION.

For the reasons here outlined we submit that the Petition for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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June, 1964.

## APPENDIX.

### Excerpts from Section 3 of Federal Power Act, Part I.

"Sec. 3 [*As amended August 26, 1935.*] The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * * *

"(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

* * * * * * * * *

"(11) 'project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in

connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

"(12) 'project works' means the physical structures of a project; * * *"

(41 Stat. 1063, 49 Stat. 838; 16 U. S. C. 796.)

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 123

FEDERAL POWER COMMISSION

*v.*

UNION ELECTRIC COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR FEDERAL POWER COMMISSION

### OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (R. 269) is reported at 326 F. 2d 535. The order (Opinion No. 356) of the Federal Power Commission (R. 143) is reported at 27 FPC 801.

### JURISDICTION

The decree of the court of appeals (R. 298) setting aside the Commission's order was entered on January 13, 1964, and a timely petition for rehearing was denied on February 13, 1964. By order of Mr. Justice White, dated May 8, 1964, the time within which to petition for a writ of certiorari was ex-

tended to May 28, 1964. The petition was filed on May 27, 1964, and certiorari was granted on October 12, 1964 (R. 303). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and § 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

## QUESTIONS PRESENTED

1. Whether a hydroelectric project located on a non-navigable tributary of a navigable river affects "the interests of interstate or foreign commerce", within the meaning of § 23(b) of the Federal Power Act, where the project is part of an integrated multi-State system and project energy is transmitted in interstate commerce.

2. Whether the court of appeals was warranted in rejecting the Commission's finding that the project would affect the navigable capacity of the Black River and on that independent ground was required to be licensed.

## STATUTE INVOLVED

The statutory provision directly involved, Section 23(b) of the Federal Power Act, as amended (41 Stat. 1063, 49 Stat. 838, *et seq.*; 16 U.S.C. §§ 791a–825r), reads as follows:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States

(including the Territories), or utilize the surplus water or waterpower from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Other relevant provisions are set forth in Appendix A, *infra*, pp. 40–46.

STATEMENT

This case involves an order by the Federal Power Commission requiring respondent Union Electric Company to apply for a license under Part I of the Federal Power Act [1] for its Taum Sauk hydroelectric pumped-storage project.[2] Taum Sauk is located in Missouri on the East Fork, a non-navigable stream, four miles above its confluence with the Black River, a navigable water of the United States. It is one of several generating sources which Union Electric owns and operates as part of an integrated generation, transmission, and distribution system in the States of Missouri, Illinois, and Iowa. The examiner found that Union "is a member of the Illinois-Missouri Pool, sharing in its operations, obligations and benefits; that it sells electric energy in the States of Missouri, Illinois and Iowa; that it is interconnected with other electric utilities including some which operate outside the State of Missouri; that power flows over transmission lines of Union, from Missouri to Illinois,

[1] The Federal Power Act was originally enacted as the Federal Water Power Act (Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791–823). By Title II of the Public Utility Act of 1935 (Act of August 26, 1935, 49 Stat. 838, 16 U.S.C. 791a–825r), the original Federal Water Power Act, as theretofore amended, was amended and made Part I of the "Federal Power Act" and Parts II and III were added.

[2] The proceeding was instituted under Section 23(b), *supra*, pp. 2–3, to determine whether a license was required for the proposed construction and operation. Although as a matter of fact respondent has constructed the project and put it into operation, we here discuss the issues, as they were originally presented, in terms of a proposed project.

from Illinois to Missouri, from Iowa to Missouri, from Iowa to Illinois and from Illinois to Iowa; that it has been receiving firm capacity and reserves from the Illinois-Missouri Pool; that the Taum Sauk Project will be interconnected via two 138 kv circuits to the Union interstate network; that the Taum Sauk Project works will provide an instantaneous reserve available to pick up load in event of breakdown of other generating equipment connected to the interstate network" (R. 95). It was stipulated that electric power generated by the proposed plant will be utilized in Missouri and will be transmitted to and utilized in Illinois, and possibly Iowa (R. 79).

The project consists of an "upper pool," a 32-acre storage reservoir constructed at the top of a mountain 1515 to 1625 feet above sea level, and a "lower pool" at 750 feet elevation, created by damming the natural flow of East Fork. The lower reservoir, impounded by a 60-foot dam, covers approximately 370 acres and has a usable storage capacity of 4350 acre feet of water (R. 74–75, 80–81). Taum Sauk is used to generate electric energy to meet the daily peak-load demands on the system with which it is integrated. In off-peak hours during the night it uses power from other sources on that network to pump water from the lower pool to the upper pool. During the daytime hours, when the peak demand occurs, the water is released from the upper pool, generating electric energy by its precipitous fall into the lower pool. Thus the project may be thought of as a great storage battery, taking electric energy supplied by generating

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plants in several States during some hours of the day and supplying electric energy to the pool loads in several States during other hours. Taum Sauk is a project of major magnitude, having a generating capacity of 350,000 kilowatts (R. 152)—almost three times the generating capacity of Union Electric's famous Mississippi River hydroelectric project at Keokuk and a third more than the Niagara Falls pump-back project involved in *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99.

During normal stream flows, and assuming no emergency operations or malfunction of facilities, the operation of the project would neither increase nor decrease the natural stage or flow of waters below the dam (R. 75, 92). However, in the event of such malfunction or emergency, or of abnormal flows—conditions stipulated to be possible—the project might significantly affect the level both of East Fork and the Black River. If, for example, conditions were such that the lower pool were already full at the beginning of the generating phase of the cycle (either because the streams above were pouring into the pool at a rate exceeding the capacity of the dam sluices, or because of malfunction of the sluices), the operation of the plant at full load until the upper reservoir is drawn down would raise the stage of the East Fork at the Lesterville gage (.7 mile above its confluence with the Black River) 5.7 feet above the natural stage, at average stream flow. The rise in the stage of the Black River at the Annapolis gage (11 miles below the mouth of East Fork) would be

3.4 feet (R. 76–77). Under the same circumstances, a switch from generating to pumping would reduce the stage at the Annapolis gage to .2 foot below the natural stage (R. 77). Thus the total fluctuation in stage at average flow would be 3.6 feet.

The Commission ruled that the project would affect the interests of interstate commerce within the meaning of Section 23(b) of the Act (R. 151–164) on two alternative grounds: (1) that a substantial part of its power is transmitted in interstate commerce; and (2) that the project may, under certain conditions, affect the navigability of the Black River. The court below reversed on both grounds. As to the first, it held that "the interests of * * * commerce" referred to in § 23(b) are limited to interests of commerce "on water" (R. 292–293). As to the second, it held that the Commission's determination of effect on navigability was not supported by substantial evidence (R. 288).[3]

## SUMMARY OF ARGUMENT

1. Section 23(b) of the Federal Power Act prohibits the construction of any works on any navigable stream, for the purpose of developing power, without a license from the Commission. It further provides that any person intending to construct project works on any stream, "over which Congress has jurisdiction under its authority to regulate commerce

[3] The court below first rejected Union's contention that the Commission had no authority to determine its licensing jurisdiction by an order reviewable under Section 313(b) of the Act (R. 275). Union has not sought certiorari, and this issue, therefore, is not presented to the Court at this time.

with foreign nations and among the several states," other than a navigable stream, must file a declaration of such intention with the Commission. If upon investigation the Commission finds "that the interests of interstate or foreign commerce would be affected by such proposed construction," the project may not be built or operated without a license. The issue presented here is whether a large pumped-storage hydroelectric project, constituting an integral part of a coordinated interstate power system and generating substantial quantities of energy for transmission in interstate commerce, is one which the Commission could properly find would affect "the interests of interstate or foreign commerce." The court below held that it was not. In its view, the only "commerce" which is relevant to this jurisdictional determination is commerce on the navigable waterway itself. In thus construing the relevant portion of Section 23(b) as though it required a license only where "the interests of interstate or foreign commerce *on navigable waters* would be affected," the court below read into the Act a limitation which appears contrary both to its letter and purpose, and which would exclude from the Commission's licensing jurisdiction an increasingly important class of hydroelectric projects.

We point out first that the Taum Sauk project is well within the language of the statute. "[H]alf a dozen enactments * * * are sufficient to illustrate that when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not

only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce.'" *Polish Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 647. The National Labor Relations Act, for example, which governs unfair labor practices "affecting" commerce, has repeatedly been held applicable to enterprises producing goods for interstate shipment and, indeed, even to a public utility generating and distributing electricity for use within a single State by railroads and other enterprises engaged in interstate commerce. *A fortiori* commerce would be affected where, as here, the utility's electric output is itself transmitted directly out of State.

The Eighth Circuit's interpretation also ignores the historic purpose of the Act. Unlike earlier legislation, the Federal Water Power Act of 1920 was not concerned primarily with the protection of navigation. Rather, it was "the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, *insofar as it was within the reach of the federal power to do so* * * *." *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission,* 328 U.S. 152, 180–181. (Emphasis added.) Its objective was to secure the optimum use of a vital natural resource for a multiplicity of purposes affecting the national interest—including, prominently, the development of hydroelectric power. To be sure, Congress, in writing Section 23, did not focus specifically on the jurisdictional question involved here, and

many members apparently believed that Congress was powerless to regulate projects on non-navigable tributaries except for the limited purpose of protecting downstream navigability. Nonetheless, Congress conspicuously refrained from writing any such limitation into the Act; instead, it adopted language sufficiently comprehensive to place within the Commission's licensing jurisdiction all projects which might later be held subject to federal regulation under evolving concepts of the Commerce Clause.

Finally, we demonstrate that neither of the considerations chiefly relied upon by the court below—(a) the Commission's conceded lack of jurisdiction over steam generating plants even when transmitting energy in interstate commerce or (b) the absence of any prior Commission decision asserting jurisdiction over a hydro project on the ground here urged—provides a sound basis for the court's decision.

2. The Commission held in the alternative that the Taum Sauk project was required to be licensed because of its potential effect on the downstream navigable capacity of the Black River. The court below rejected that determination as lacking support in the record, since the evidence showed that, under normal stream flows, the careful and efficient operation of the plant in accordance with present plans would not materially affect the level or flow of the Black River. However, the undisputed evidence shows that, under conditions of river flow which have actually been experienced in the past, the Taum Sauk project could materially affect the level of the Black

River if the project were called upon to meet emergency needs for additional electric energy or in the event of malfunction or improper operation of the facilities. The court below deemed it a sufficient answer that, if it later develops that navigability is impaired or threatened, the Commission might then intervene. We submit, however, that the Commission is not constrained to wait until the adverse potentialties of the project have already materialized, but may take steps to forestall them. The decisions of this Court have recognized that Congress may validly authorize preventive regulation of activities which have no immediate and continuing effect upon commerce but only the potentiality of such effect. Congress did no less here.

## ARGUMENT

### I

### THE COMMISSION'S UNCHALLENGED FINDING THAT THE TAUM SAUK PROJECT UTILIZES WATER POWER TO GENERATE ELECTRIC ENERGY FOR TRANSMISSION IN INTERSTATE COMMERCE SUSTAINS ITS CONCLUSION THAT A LICENSE IS REQUIRED

#### *Introductory*

Pumped-storage projects, of which Taum Sauk is a notable example, are a relatively recent engineering development.[4] Such projects generate electric energy

[4] The economic feasibility of pumped-storage development depends upon (1) availability of two suitable reservoir sites, with one at a much higher elevation than the other; (2) an adequate source of water supply; (3) proximity to large electric loads; (4) a suitable type of load (predominantly supplied from steam-electric sources, with space in peak to absorb output of pumped-storage plant; (5) availability of off-

during hours of peak demand by using the fall of water from a high altitude man-made pool into a lower pool created by damming the natural flow of a river. During off-peak hours, the water is pumped back to the upper pool. This technique has made it possible for many tributaries with relatively small streamflows to produce energy in quantities formerly obtainable only from large hydro plants on navigable mainstreams or their more important tributaries.

Almost invariably, such projects are intimately and essentially related to interstate commerce. Since the pumping phase of the cycle requires energy from other sources, the project must necessarily be operated in coordination with other generating plants. In most instances, the project is economically feasible only when used to generate large aggregates of power adequate to meet the requirements of interstate markets. Here, it is not disputed that the project in question would play a significant role in the integrated and co-

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peak low cost electric power supply. Suitable sites are not plentiful and they must be carefully planned and developed, as in the case of conventional hydroelectric sites, in order to get the fullest economical development.

The F.P.C. National Power Survey, 1964, pp. 123–126, lists pumped storage sites that have been identified as "having features suitable for development * * *." These aggregate about 36,000,000 kw capacity, including plants in operation and under construction. Development of conventional hydroelectric sites to date (a period of about 75 years) has utilized only about 40,000 megawatts out of an estimated potential of 134,000 megawatts, or 30%. In the next 15 years it is estimated that development of pump-back projects will utilize 19,000 megawatts of the presently estimated 36,000 megawatts capacity of the identified suitable sites, or 53%. (*Id.*, 93, 215, 123.)

ordinated operations of a large interstate power system. The only real point of dispute on this phase of the case, therefore, is whether the statute should be read as confined to projects affecting commerce on the river as distinguished from commerce in its broader sense.

A. THE COMMISSION'S ASSERTION OF JURISDICTION IS SUPPORTED BY THE UNEQUIVOCAL LANGUAGE OF SECTION 23(b)

Section 23(b) of the Federal Power Act (*supra*, pp. 2–3) prohibits the construction of any works on any navigable stream, for the purpose of developing electric power, without a license from the Commission. It further provides that any person intending to construct project works on any stream "over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States," other than a navigable stream, must file a declaration of such intention with the Commission. If, upon investigation, the Commission finds "that the interests of interstate or foreign commerce would be affected by such proposed construction," the project may not be built or operated without a license. If the Commission does not so find, the statute itself grants permission to construct the project upon compliance with State law.

The court of appeals agreed that "Congress has taken jurisdiction over the non-navigable tributaries of navigable waters and intends to retain and exercise such jurisdiction through the Federal Power Commission where any obstruction or construction on such non-navigable tributary would affect the interests of

interstate or foreign commerce" (R. 279). But it then proceeded to hold that the only type of "commerce" which is relevant to this jurisdictional determination is commerce on navigable waters.[5] In its view, a project such as Taum Sauk would be subject to licensing only if it were shown to affect downstream navigable capacity or to be part of an overall plan for protection or development of the waterway as an artery of navigation; but it would not be enough that a water resource is used to generate energy for a coordinated interstate power system.

We submit that in construing the relevant portion of Section 23(b) as though it required a license only where "the interests of interstate or foreign commerce *on navigable waters* would be affected," the court below has read into the Act a limitation which appears contrary both to its letter and purpose, and which would exclude from the Commission's licensing jurisdiction an increasingly important class of hydro-

[5] The court's opinion is not altogether clear. On the one hand, it expressly rejected "Union's narrow construction," *i.e.*, that "it is the interest of commerce on water and not the interest of commerce conducted by other media which must be affected by the construction on a nonnavigable stream in order to bring the licensure provisions of the Act into effect" (R. 291). On the other hand, in reaching its own conclusion (R. 293) that "The Commission's jurisdiction must logically rest upon its delegated congressional jurisdiction over the interest of commerce on navigable waters," the court said (R. 292) "without delineating all of them that there are other considerations such as proper development of watershed areas, flood control and proper utilization of natural resources that would have an effect on navigability and as such would be proper items of consideration in passing upon whether the interest of foreign or interstate commerce would be affected."

electric projects. In our view, Section 23(b) requires a license for construction of any water power project[6] on any part of the headwaters of a navigable river which will affect *in any way* the interests of interstate commerce, and it merely exempts from Commission licensing those projects that could serve only local, intrastate purposes.

We note at the outset that the Commission's reading could hardly be resisted by a suggestion that it would raise constitutional doubts. Congress has undoubted power under the Commerce Clause to license and regulate all power projects—whether hydroelectric or otherwise, and wherever situated—which generate energy for transmission and use in interstate commerce.[7] It follows *a fortiori* that federal au-

[6] The statute does not use the word "water power" or similiar modifier of the "project" and "project works" covered. However, the more reasonable interpretation would appear to limit the statute to such projects because, *inter alia*, Section 23 regulates only those projects located "across, along, over, or in any * * * stream or part thereof * * *." While steam generating plants (and now atomic generating plants) are, of course, often located along federal waters, and Congress might reasonably be concerned lest such locations be usurped so as to be unavailable for potential hydro development, we believe that the Power Act is limited to water power projects, since it does not purport to prohibit, restrict or regulate any other activity along federal waters which might interfere with power development.

[7] "The commerce power * * * extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make the regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315

thority extends to the lesser included class of projects which not only produce energy for transmission to other States, but which generate that energy by utilizing water resources which in themselves are under the supervision of Congress.[8]

Nor can it be suggested that the Commission's reading of the statute is in any sense unusual or unnatural. "[H]alf a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce."[9] *Polish Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647. Part I of the Power Act is no exception.

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U.S. 110, 119. Thus, "Even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'." *Wickard* v. *Filburn*, 317 U.S. 111, 125. See also, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37; *United States* v. *Darby*, 312 U.S. 100, 119; *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226–227.

[8] Congress has control over the use of non-navigable tributaries of navigable streams. *Oklahoma* v. *Guy F. Atkinson*, 313 U.S. 508; *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 232–233; *Grand River Dam Authority* v. *Grand Hydro*, 355 U.S. 359, 373; *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426. It is arguable that Congress may regulate the use of such a tributary, irrespective of whether that use in and of itself would have an effect on interstate commerce. This Court has never decided that question and need not decide it here.

[9] See *e.g.*, Act of June 18, 1934, § 2, 48 Stat. 979; Bituminous Coal Act, § 4–A, 50 Stat. 72, 83; Civil Aeronautics Act, § 1(3),

Although we deal more fully with its legislative history *infra* (see pp. 20–29), we note at this point that the House committee report on the 1935 amendments to the Federal Power Act states that it was "the broad objective of the act to secure Commission control over all projects involving the development of the Nation's water resources" and to enable the "Commission to maintain control over all projects with which the Federal Government has any valid concern." H. Rep. 1318, 74th Cong., 1st Sess., pp. 24, 26. To the same effect, see S. Rep. 621, 74th Cong., 1st Sess., pp. 44, 47.

There can be no doubt that a project, such as Taum Sauk, which produces electric energy for transmission to other States, is one which "affects" commerce.[10] The National Labor Relations Act, which governs unfair labor practices "affecting commerce," has repeatedly been held applicable to enterprises producing goods for interstate shipment. *E.g., National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40–41; *National Labor Relations Board* v. *Fruehauf Trailer Company*, 301 U.S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Company*, 301 U.S. 58. It has been applied, moreover, even to a utility producing and

52 Stat. 973, 977, 49 U.S.C. (1952 ed.) 401(3); Federal Employers' Liability Act, § 1, as amended, 53 Stat. (Part 2) 1404, 45 U.S.C. 51; Transportation Act of 1920, § 307(b)(3), 41 Stat. 456, 471; Tennessee Valley Authority Act, § 31, 49 Stat. 1075, 1080, 16 U.S.C. § 831dd.

[10] We use "commerce" herein as a short term for the statutory phrase, "interests of interstate or foreign commerce."

distributing steam and electricity generated and used wholly within a single State. In *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, Edison's activities were deemed to affect commerce because some of its electric energy was sold to railroads and other enterprises engaged in interstate operations. *A fortiori,* commerce would be affected where, as here, a part of the utility's electric output is itself transmitted directly out of State.[11] See, also, *Amalgamated Ass'n of Street, Electric Ry., etc.* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 391–392:

> * * * Ever since the question was fully argued and decided in *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197 (1938), it has been clear that federal labor legislation, encompassing as it does all industries "affecting commerce," applies to a privately owned public utility whose business and activities are carried on wholly within a single state. * * * No dis-

[11] *Utah Power and Light Co.* v. *Pfost,* 286 U.S. 165, cited by the court below, is not to the contrary. That case holds simply that the generation of electric energy, like the manufacture of goods (pp. 180–181), is a local operation subject to State and local taxation. It has long been clear, however, that an activity may be taxable by the State, yet affect interstate commerce sufficiently to warrant federal regulation. This Court has often held that "interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each state may impose on the activities or property within its borders" *Ott* v. *Mississippi Valley Barge Line Company,* 336 U.S. 169, 174; thus "federal regulation does not preclude state taxation and state taxation does not preclude federal regulation." *Polish Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 649.

> tinction between public utilities and national manufacturing organizations has been drawn in the administration of the Federal Act * * *."[12]

Indeed, the relationship between the generation and interstate transmission of electric power is far more direct and immediate than that between the production and interstate shipment of goods, particularly where, as in the present case, the generating plant functions in coordination with other power sources in the same integrated system. The generating units of such a plant are locked by an electro-magnetic bond with every other interconnected generating unit. Every unit reacts with every other to all changes in speed or load. When there is a sudden change in load, all units automatically assist in meeting it. The speed of the entire synchronized system is controlled by a particularly sensitive governor on a selected large generator which may be located in a distant State. Each generating unit on the system may be assigned to supply a specified block of the load curve for the entire interstate system, or may be used as "spinning reserve," rotating in synchronism with all other generating units without feeding energy into the system, but primed to do so immediately in the event of an outage anywhere in the system. A plant so operating assists in controlling voltage and stabilizing the synchronization of the whole system. Because of these and other factors, sales of electric service to every customer are "not sales of the output of [a

[12] *Pfost*, it should also be noted, predates *Consolidated Edison*, *supra*, 305 U.S. 197, and the numerous later decisions cited in *Amalgamated Ass'n of Street, Electric Ry. etc., supra*.

particular plant] but sales of the output of the integrated and coordinated interstate electric system". *Pennsylvania Water and Power Co.* v. *Federal Power Commission,* 343 U.S. 414.

It is also obvious that the sound construction, adequate maintenance, and efficient operation of a project like Taum Sauk—matters which would be subject to the Commission's continuing supervision if the project were licensed—are essential to the effective operation of the interstate system of which it is part. Plainly, therefore, the Commission could properly find that "the interests of interstate or foreign commerce would be affected" by the project.

B. THE COMMISSION'S CONSTRUCTION IS CONSISTENT WITH THE HISTORIC PURPOSE OF THE ACT

1. The view of the court below that "interstate commerce", as that term is used in § 23(b), means "commerce on navigable waters" ignores the historic purpose of the Federal Power Act. Unlike earlier measures such as the River and Harbor Acts of 1890 and 1899 (26 Stat. 453; 30 Stat. 1151), the Water Power Act of 1920 was not concerned solely with the protection of navigation. Nor, on the other hand, was it a "public utility" statute designed to regulate the sale and transmission of energy, as was Part II of the Federal Power Act, enacted fifteen years later. In essence the 1920 legislation was a conservation measure. Its objective was to promote the conservation and the optimum use and development of a vital natural resource—the river systems of the nation—

for *all* purposes affecting the national interest, including, very prominently, the development of hydroelectric power to meet the needs of an expanding economy. Those broad aims are reflected in Section 10(a) (16 U.S.C. 803(a)), which requires, as a condition for obtaining a license, that the proposed project "be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the *improvement and utilization of water-power development,* and for other beneficial public uses, including recreational purposes * * *." (Emphasis added.) See *United States* v. *Appalachian Power Co.,* 311 U.S. 377.

As this Court stressed in *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission,* 328 U.S. 152, 180–181, the 1920 Water-Power Act—

> was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, *insofar as it was within the reach of the federal power to do so,* instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted * * *. [Emphasis added.]
>
> That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act * * *.

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The conservation movement, which culminated in the 1920 Act, took its keynote from President Theodore Roosevelt's 1908 veto of a bill which would have turned over to private interests, free of charge, important power sites on the Rainy River. The veto message proclaimed:

> We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this power. * * *
>
> * * * * *
>
> It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water *or complete development of the power.* [Emphasis added.]

42 Cong. Rec. 4698 (1908). See Kerwin, *Federal Water-Power Legislation* (1926); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation,* 14 G. Wash. L. Rev. 9, 16–17 (1945).

In the same year, President Roosevelt appointed the Inland Waterways Commission, noting, in a letter to its members (42 Cong. Rec. 6968 (1908)), that "[w]orks designed to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, *the development of*

*power,* the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes; * * * the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country." (Emphasis added.) In its preliminary report, the Commission declared that the plans for any use of the waterways should "take account of the purification of the waters, *the development of power,* the control of floods, the reclamation of lands by irrigation and drainage, and all other uses of the waters or benefits to be derived from their control" (S. Doc. 325, 60th Cong., 1st Sess., p. 25). (Emphasis added.)

These were the purposes which, after more than a decade of bitter controversy, both in Congress and in the wider public arena, came to be embodied in the Water Power Act of 1920. They were the same purposes for which the Tennessee Valley Authority was later created. To hold, as did the court below, that the use of the nation's water resources to generate the power supply of a multi-State area is not an aspect of interstate commerce with which Congress was concerned is to misread the history both of the period and of the Power Act.

2. We do not say that Congress had cases like the present one specifically in mind when it adopted the provision involved here. Quite plainly it did not. Prior to the development of the pumped-storage technique, hydroelectric projects large enough to serve interstate markets were generally large enough

so that they would also affect downstream navigable capacity. There was little occasion in 1920 for Congress to differentiate between the two types of "effects" or to focus upon the jurisdictional issue presented here. Furthermore, the scope of the commerce power was at that time a matter of considerable uncertainty. Two years earlier, in *Hammer* v. *Dagenhart*, 247 U.S. 251, this Court had struck down the federal Child Labor Act, thereby casting serious doubt on the power of Congress to regulate "local" activities such as the manufacture of goods for interstate shipment or, by analogy, the use of non-navigable waters to generate electric energy for interstate transmission. The prevailing uncertainty was reflected in statements by several members of both Houses during the debates on Section 23(b), expressing the belief that Congress was powerless to regulate projects on non-navigable tributaries except for the limited purpose of protecting downstream navigation or navigability. See, *e.g.*, 56 Cong. Rec. 8917, 9038; 57 Cong. Rec. 4638–4639; 59 Cong. Rec. 6529–6531, 7723, 7725, 7730.

What is important, however, is that Congress conspicuously refrained from writing any such limitation into the Act; instead, it adopted language sufficiently comprehensive to place within the Commission's licensing jurisdiction all projects subject to regulation by the federal government under evolving concepts of the Commerce Clause.

It may be noted that a prior version of the text ultimately adopted *would* have tied the Commission's

authority to the concept of navigation. A bill passed by the House in the preceding session of Congress (S. 1419, 65th Cong., 2d Sess.) contained a provision which would have authorized the granting of a license application for a project on a non-navigable stream "if the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways *for the use or benefit of navigation* in interstate or foreign commerce". (Emphasis added.) Conservationist senators, led by Senator LaFollette, objected to certain features of that bill (notably its narrow definition of "navigable waters") and joined the filibuster which, in the closing hours of the session in 1919, prevented enactment of the measure (Kerwin, *Federal Water-Power Legislation, supra,* at 253–254). The bill which became the Federal Water Power Act of 1920 (H.R. 3184, 66th Cong., 1st Sess.) contained the same language when it left the House. The Senate committee, however—whose version was to prevail in conference—omitted the reference to navigation and substituted the broader language requiring a license if the Commission finds that "the interests of interstate and foreign commerce would be affected." Neither the Senate committee nor the conference committee offered any explanation for the change. See S. Rep. No. 180, 66th Cong., 1st Sess., p. 1; H. Rep. No. 910, 66th Cong., 1st Sess., p. 6. In light of the then prevailing constitutional views expressed on the floor of Congress, it may be that the House intended by its "benefit of navigation"

language to delegate the full measure of congressional power under the Commerce Clause. In all events, the Senate committee, in substituting the more general phraseology of "affecting interstate commerce," made that intention explicit.

The structure of Section 23(b) was completed by amendments contained in the Public Utility Act of 1935. While the 1920 legislation prohibited the construction of an unlicensed project on non-navigable waters in any case where the proponent had voluntarily filed a declaration of intention and the Commission had found that the project would affect interstate commerce, it did not make the filing of such a declaration mandatory. A proponent who filed a declaration and obtained a Commission determination was either forbidden or affirmatively authorized to proceed without a federal license, depending on the nature of the Commission's finding. On the other hand, a person who chose not to file a declaration was in no way prohibited from constructing an unlicensed project (though in so doing he would lack the security of tenure which a license conferred and, in particular, would assume the risk that the project might run afoul of Section 10 the River and Harbor Act of 1899 as an obstruction to downstream navigable capacity). The 1935 amendments removed that anomaly by *requiring* that a declaration of intention be filed by every person proposing to construct a project on a non-navigable tributary. Even in 1935 the breadth of the commerce power had not yet been established (see *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495), and comparatively restrictive views of that

power no doubt continued to be held by some members of Congress (see 79 Cong. Rec. 10568).[13] The tendency to equate the interests of "interstate commerce" with the "interests of navigation" is illustrated by the committee reports on the Public Utility Act, which described the amendment in Section 23(b) in the following terms:

> * * * the provision making discretionary the filing of applications for preliminary permits for the construction of projects in the non-navigable tributaries of navigable streams is changed to make such applications mandatory. In this way, every person intending to construct a project which might affect navigation would be required to come to the Commission for a determination of the interests of the United States. *This would greatly strengthen the act by enabling the Commission to maintain control over all projects with which the Federal Government has any valid concern.* (Emphasis added.)

H. Rep. No. 1318, 74th Cong., 1st Sess., p. 26. To the same effect, see S. Rep. No. 621, 74th Cong., 1st Sess., p. 47. But despite the reference to projects which "might affect navigation," the reports reflect the purpose of Congress to grant the Commission licensing authority over all waterpower projects within reach of the commerce clause.

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[13] During the hearings on the 1935 Act, Dozier DeVane, the Commission's Solicitor expressed the opinion that "affecting navigation" and "affecting the interests of interstate commerce" were synonymous concepts, though he conceded that the question was debatable. Hearings before the House Commerce Committee on H.R. 5423, 74th Cong., 1st Sess., p. 474.

Nowhere in the legislative history, so far as we are aware, is there any indication that Congress intended the words "interstate or foreign commerce" in Section 23(b) to carry a narrower meaning than their constitutional counterparts. Nor is there any "expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power" or to "freeze" the construction of Section 23(b) "within the mold of then current judicial decisions defining the commerce power." *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 556–557. Cf. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110.[14] In these circumstances, there is no justifica-

[14] That case sustained the Secretary of Agriculture's regulation of intrastate handling of milk because of its effect on interstate commerce. While the Agricultural Marketing Agreements Act was pending in Congress, this Court handed down its *Schechter* decision, *supra*, limiting the federal commerce-clause jurisdiction to regulation of activities "directly" affecting interstate commerce. Specifically because of the *Schechter* decision, the pending legislation was rewritten (50 Stat. 246, 7 U.S.C. 608c) so as to authorize the Secretary of Agriculture "to regulate the handling of products 'directly affecting' interstate commerce" and to delete the phrase "in competition with" interstate commerce, which had appeared in the earlier version of the bill. 315 U.S. at 124. The congressional committee reports showed that the revised bill was intended to confer on the Secretary "the full extent of the Federal power over interstate and foreign commerce and no more." *Ibid.* The Court concluded that, as passed, the statute validly "conferred upon the Secretary authority to regulate the handling of intrastate products which by reason of its competition with the handling of interstate milk so affects that commerce as substantially to interfere with its regulation by Congress." 315 U.S. at 125.

tion for giving the statute an artificially narrow construction in order to confine its application within the ambit that individual congressmen may have thought, in 1920, represented the limits of federal power with respect to water resources.

C. THE CONSIDERATIONS RELIED UPON BY THE COURT BELOW DO NOT SUPPORT A CONTRARY CONCLUSION

In support of its narrow construction, the court below relied principally on two propositions. *First,* the court suggested that the Commission would "admittedly" have no licensing authority over a steam-generating plant merely because its output would be transmitted in interstate commerce, and that there is no difference between the generation of energy by a steam-plant and the generation of energy by a hydroelectric project which would justify a distinction in jurisdictional treatment (R. 293). *Second,* the court stated that the Commission's present position "represents a decided departure from its administrative construction of the statute" and "one not based upon generally acknowledged limits of jurisdiction throughout the years" (R. 295). We take issue with both propositions and submit that neither of them provides a sound basis for the conclusion reached below.

1. The failure of the court below to perceive a relevant distinction between steam-generating plants and hydroelectric projects is symptomatic of its basic misconception of the objectives of Part I of the Act and may reflect also a confusion between the aims of Part I and those of Part II. Under Part II, which originated in the Public Utility Act of 1935, the

Commission regulates various aspects of the transmission and sale of electric energy in interstate commerce and other activities of the companies engaged therein. For purposes of *that* Part, the source of the energy and the method of generation are immaterial; steam plants and hydroelectric plants stand on the same footing and neither is regulated as such.[15]

In contrast, Part I of the Act, which alone is in issue here, is concerned not with the transmission of energy as such, but with the utilization of the water resources of the nation and particularly the power potential inherent in the water. In relation to *that* purpose, the distinction between a hydroelectric project, which uses the power of falling water to drive turbines and thereby generate energy, and a steam (or atomic) plant is obvious. The background and history of the 1920 Federal Water Power Act, and indeed even its title, indicate that the licensing provisions were intended to apply to water power projects alone (see, *supra*, p. 15, fn. 6) and the Commission has always assumed that a steam plant—even one located on the bank of a navigable river and using river water to cool its condensers—does not constitute a "project" within the contemplation of the Act (section 3(11)). Plainly, however, the failure or inability of the Commission to regulate steam plants lends no support to the Eighth Circuit's view that the interstate flow of energy is not a relevant "[interest] of interstate * * * commerce" under Section 23(b).

[15] See *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 960–961 (C.A. 2), certiorari denied, 319 U.S. 741.

For, as noted, the Commission does not seek to license steam plants even when situated on the navigable mainstream itself, in which case no finding as to "the interests of * * * commerce" would be required. The status of steam-generating plants under Part I is thus wholly immaterial to the jurisdictional issue presented here.

2. The fact that the Commission's licensing decisions have not asserted jurisdiction on the ground it now urges is of little significance and certainly not controlling. Under the state of the art in 1920, hydroelectric generation of power was confined to harnessing the natural fall of rivers. Most projects which produced electric energy in sufficient quanties to serve interstate markets were necessarily located on navigable streams or, if situated on a tributary, used enough water to affect the navigability of the mainstream. Thus, virtually any hydroelectric project large enough to have a significant effect on the interests of commerce was subject to its licensing jurisdiction irrespective of the effect of its electric output. It is not surprising that the Commission, beginning in 1920, should have been content to rely on an undisputed ground of jurisdiction—*i.e.*, effects on navigation and navigability—rather than asserting one which would have given rise to needless controversy.

It is true that in 1954 the Commission rejected an examiner's holding that a project required a license because it generated energy for interstate transmission. *California Oregon Power Company*, 13 FPC

1, 3. The two passing sentences addressed to this point, however, were entirely gratuitous, since that project was held to require a license on the indisputable grounds that it would occupy government lands and would affect downstream navigability. See *California Oregon Power Co.* v. *Federal Power Commission*, 239 F. 2d 426 (C.A.D.C.). Aside from that one cursory dictum, we are aware of no opinion of the Commission which has adverted to the question involved here.[16] Thus, it cannot be said that there has been a settled administrative interpretation. And, even if there were, the fact that the Commission may have taken an overly narrow view of its responsibilities in the past does not alter the requirements of the statute. In a related field, the Commission for many years disclaimed regulatory authority over independent producers of natural gas, only to be corrected by this Court in the *Phillips* case. "Even consistent error," said the Court, "is still error." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678, fn. 5. See, also, *e.g.*, *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 123; *Wilbur* v. *United States*,

[16] We note additionally that in the *Appalachian Power* litigation, counsel for the United States and the Commission urged the view of the statute which the Commission expressly adopted in the instant case. That view was rejected by the court of appeals. *United States* v. *Appalachian Power Co.*, 107 F. 2d 769, 793 (C.A. 4). The contention was renewed before this Court (October Term, 1940, No. 12, Brief for the Petitioner, pp. 124–126), but the Court found it unnecessary to reach the point, reversing the court of appeals on other grounds (*i.e.*, that the waters there in issue were navigable waters of the United States). *United States* v. *Appalachian Power Co.*, 311 U.S. 377.

281 U.S. 206, 217; *American Trucking Ass'n* v. *United States*, 344 U.S. 298, 314.

## II

### THE TAUM SAUK PROJECT IS ALSO SUBJECT TO LICENSING BECAUSE OF ITS POTENTIAL EFFECT UPON THE NAVIGABILITY OF THE BLACK RIVER

The Commission, adopting the examiner's findings, held in the alternative that the Taum Sauk project was required to be licensed because of its potential effect on the downstream navigable capacity of the Black River.[17] The court below rejected that determination as lacking adequate support in the record. For purposes of this argument we accept the court's conclusion that, after the period of initial construction and under normal conditions of river flow, the careful and efficient operation of the project in accordance with present plans will not significantly affect the level of the Black River. Nor do we here quarrel with the finding that the initial impounding of the lower pool will probably be a "one-shot" operation, the temporary effect of which would not in itself call into play the licensing requirement of Section 23(b).

These considerations, however, do not dispose of the issue. The undisputed evidence shows, and the examiner found (R. 90–94), that under conditions of

[17] Although the Commission sought certiorari only on the basis of the lower court's ruling that the generation of energy for interstate transmission was insufficient basis for requiring a license, the petition for certiorari (pp. 2 (n. 1), 4) reserved the right to argue on the merits that the court below erred in rejecting the Commission's alternative holding.

river flow which have actually been experienced from time to time in the past, the Taum Sauk project could materially affect the level of the Black River if the project were called upon to meet emergency needs for additional electric energy (*e.g.*, to compensate for an outage of some other power source in the same interconnected supply system, *supra*, pp. 5, 19–20) or in the event of malfunction or improper operation of the facilities. Nor are these possibilities remote. As the Commission pointed out, "[b]ecause of the varying inflow and constantly changing head of impounded water above the [sluice] gates, the sluices would require continual adjustment to permit the natural flow and only the natural flow" to be released into the stream bed of the East Fork (R. 144). Union's declaration of intention states (R. 20) that Taum Sauk will be used, *inter alia*, for "providing emergency generating capacity." And, before the Comission, Union acknowledged the possibility of "incorrect operation" (R. 210) and stated that in predicting the precise effect of operations "a number of complexities are involved not the least of which is the fact that the flow pattern of a stream is never repeated exactly and a large number of factors in regard to probability and frequency of occurrence must be assumed" (R. 207).

The court below, while taking cognizance of these facts, deemed it a sufficient answer that if "in the operation of the project it later develops at any time in the future that the navigability of the Black River is impaired or threatened to be impaired, the Com-

mission would have authority under Section 4(g) of the Act to issue an appropriate order." We submit, however, that the statute does not constrain the Commission to wait until the adverse potentialities of a project have already materialized but may take steps to forestall them. We have argued that Congress delegated to the Commission full measure of its authority over hydroelectric projects affecting interstate commerce. At the very least, however, it withheld none of its constitutional power over projects affecting navigation or downstream navigable capacity. And the decisions of this Court have recognized that Congress may validly authorize preventive regulation of activities which have no immediate and continuing effect upon commerce, but only the potentiality of such effect.

Thus, in *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* 305 U.S. 197, the Court upheld federal regulation of the labor relations of an electric utility serving companies operating in interstate commerce even though the utility's own operations and sales were purely intrastate. After briefly summarizing some of the disruptive effects which industrial strife within the electric company might have on interstate commerce, the Court said (305 U.S. at 221–222):

> If industrial strife due to unfair labor practices actually brought about such a catastrophe, we suppose that no one would question the authority of the Federal Government to intervene in order to facilitate the settlement of the dispute and the resumption of the essential

> service to interstate and foreign commerce. But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

See, also, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326; *Gilman* v. *Philadelphia*, 3 Wall. 713, 724. Such preventive measures, we submit, are no less appropriate when the consequences sought to be averted include the breaking of a poorly engineered dam [18] than when they involve a disruptive work stoppage.

We deal here, moreover, with a form of regulation—licensing—which by its very nature is preventive, rather than remedial, in its emphasis. Through licensing, the Commission may impose conditions to assure that the project will be designed, constructed, maintained, and operated in a manner best calculated to avoid injury to, and promote the development of, the navigability of the main stream. Once a project is licensed, moreover, it cannot be

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[18] Dam failures are not a fanciful prospect. In 1959 the Malpasset Dam in Southern France broke, with a loss of more than 400 lives. *Engineering News Record*, November 5, 1964, p. 19. Last December, the Baldwin Hills Reservoir in Los Angeles failed with the loss of five lives, destruction of scores of homes and damage of about $15 million. See *Water Power*, October 1964, p. 405. Compare the disaster of the Vaiont Dam in Northern Italy in October 1963, when almost 3,000 persons died. See Kiersch, "Vaiont Reservoir Disaster," *Civil Engineering*, March 1964, pp. 32–39.

altered without Commission approval (Section 10(b)); it must be maintained in a condition of repair adequate for the purposes of navigation and sufficient power development, and must conform to rules and regulations prescribed by the Commission for the protection of life, health, and property (*ibid.*). And the Commission may exercise its investigatory authority under Section 301 to assure the continued operation of a licensed project in a manner consistent with the interests of navigation. Recently, for example, the Commission announced plans to adopt a new program of dam inspections to assure safety (Docket R–268, 29 Fed. Reg. 14643; FPC Release No. 13504, Appendix B, *infra,* pp. 47–48). Such a program plainly should encompass any project of the magnitude of Taum Sauk. If, as the court below ruled, the Commission's regulatory power over Taum Sauk were held in abeyance, the task of protecting the Black River would be rendered far more difficult.

We do not question the assumption of the court below (R. 297) that "both the State of Missouri and the county of [the project's] location" will properly administer "certain regulatory rights." But the Commission has no authority to delegate to State or local officials its duties with respect to the conservation, development, improvement, and utilization of navigation and water resources. See, *e.g.,* Sections 4(e), 10(a), 10(b), and 10(c). The statutory responsibility rests on the Commission alone. *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission, supra,* 328 U.S. at 168.

The opinion of the Corps of Engineers, to which the court below ascribed great weight (R. 297), does not obviate the necessity of a Commission license. The Corps of Engineers expressed the view only that the Taum Sauk project *as proposed* "would have no appreciable effect" on navigation. As previously noted, without a Commission license there is no ready legal mechanism whereby the federal government can assure that the project will be constructed, operated, and maintained according to that proposal. It is true that Section 4(e) requires that approval of project plans be secured from the Chief of Engineers and the Secretary of the Army before a license may be granted for construction of works "affecting the navigable capacity of any navigable waters." But this provision does not transfer to the Army the responsibility for determining if and when a license is required. In stating the opinion that the Taum Sauk plans were satisfactory from the point of view of navigation, the Army did not purport to, nor could it properly, decide that the Commission should not exercise continuing regulatory supervision. *Cf. Economy Light & Power Co.* v. *United States,* 256 U.S. 113, 124–125. Indeed, Colonel Tarbox of the Corps of Engineers clearly assumed that a license was to be issued for the project as proposed, and was simply stating that no conditions need be imposed requiring Union to take additional steps for the protection or preservation of navigation.

We respectfully submit that so long as a hydroelectric project on a non-navigable tributary of a navi-

gable river has a potential for affecting navigability through its construction, maintenance, or operation, it comes within the licensing requirement. Congress did not anticipate that the Commission should await a malfunction with resultant injury to person or property before acting to protect the public interest in the navigability of its waters.

## CONCLUSION

The judgment of the court of appeals should be reversed with directions to affirm the Commission's order.

Respectfully submitted.

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DECEMBER 1964.

## APPENDIX A

The Federal Water Power Act of June 10, 1920, 41 Stat. 1063, as amended, 49 Stat. 838, *et seq.*, 16 U.S.C. 791a–825r, provides in pertinent part, as follows:

SEC. 4. The commission is hereby authorized and empowered—

* * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall

deem necessary for the adequate protection and utilization of such reservation. *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State or municipality and to issue such order as it may find appropriate, expe-

dient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

* * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand [1] horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so

[1] Amended by Act of September 7, 1962, 76 Stat. 447.

maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

* * * * *

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand[2] horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this Part, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided,* That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

* * * * *

SEC. 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is

[2] Amended by Act of September 7, 1962, 76 Stat. 477.

made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

[Subsection (b) is printed *supra*, pp. 2–3.]

* * * * *

SECTION 201. * * *. (b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State Commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

* * * * *

SEC. 202. (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the

voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

* * * * *

SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of ac-

counts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.

## APPENDIX B

**FEDERAL POWER COMMISSION**

**WASHINGTON, D.C. 20426**

**Immediate Release** **Release No. 13504**

**DOCKET NO. R-268**

**(Hydro project inspections)**

**FPC PROPOSES NEW REGULATIONS TO STRENGTHEN INSPECTION PROCEDURES ON HYDROELECTRIC POWER PROJECTS TO ASSURE SAFE OPERATION**

Washington, D.C., October 20, 1964—The Federal Power Commission took steps today to strengthen its inspection procedures on hydroelectric power projects to assure their safe operation.

In a rule-making notice sent out for comment today, the FPC is proposing to require a complete project inspection at least every five years by independent consultants. These inspections could be required more frequently, and would be in addition to the present periodic inspections by the FPC staff.

Interested parties have until December 8 to submit their views and comments on the proposed new regulations.

In its notice the FPC said that the public "has a paramount interest in the safety of hydroelectric structures and it is incumbent on the Commission to assure safe operation of these projects."

The Commission pointed out that while projects are now inspected periodically by its staff, there is a definite limit on "the number and detail" of government financed inspections. The FPC said the additional inspections would assure that the Commission and the licensees have accurate information on the conditions of project structures and facilities.

The inspections would cover settlement, movement, erosion, seepage, leakage, cracking, examination of internal conditions of stress and hydrostatic pressures in the structure, its foundation and abutments, functioning of foundation drains and relief wells, and stability of critical sections of reservoir shorelines.

These detailed inspections normally would be made every five years by qualified independent engineering or geologic consultants employed by the licensee. However, they also could be made on intermediate occasions as found necessary by the licensee or an FPC representative. A report of the inspection would be made to the licensee and the FPC, together with any recommendations on necessary corrective measures.

For new projects, the first report would be due within five years of the date of the first commercial operation. When licenses are issued for already-constructed projects, the first report would be due within two years. For existing projects, already under license, a time schedule for the initial inspection which would be required after the regulation is adopted was proposed based upon the time the project has been under license.

The proposed new regulations provide for partial or complete exemption in certain special circumstances.

For further information call 386–6102.

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